

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

ROOSEVELT HUDSON HARRIS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on May 28, 1969, reversing respondent's conviction for possessing distilled spirits upon which the required tax had not been paid.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 9-12) is not yet reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 13) was entered on May 28, 1969. On June 26, 1969, Mr. Justice Stewart extended the time within which to file a petition for a writ of certiorari to July 26,

(1)

1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the reliability of information recited in an affidavit for a search warrant is sufficiently established where the affiant states that he obtained this information from an informant in a sworn statement and that the informant impressed the affiant as a prudent person.

STATEMENT

Respondent's conviction in the United States District Court for the Eastern District of Kentucky for possessing nontaxpaid distilled spirits was reversed by the Court of Appeals for the Sixth Circuit on the ground that the affidavit for a search warrant, pursuant to which the distilled spirits were seized, was insufficient to establish probable cause. The affidavit is reproduced in full as Appendix C, *infra*, pp. 15-17.

The affidavit was made by Russell R. Bauer, a special investigator for the Alcohol and Tobacco Tax Division of the Internal Revenue Service. The affiant stated that he had reason to believe that nontaxpaid distilled spirits in containers not bearing internal revenue stamps as required by law were being concealed in a described residence and nearby buildings belonging to respondent. The grounds for such belief were set forth in the following language:

Roosevelt Harris has had a reputation with me for over 4 years as being a trafficker of nontaxpaid distilled spirits, and over this period I have received numerous information from

all types of persons as to his activities. Constable Howard Johnson located a sizeable stash of illicit whiskey in an abandoned house under Harris' control during this period of time. This date, I have received information from a person who fears for their life and property should their name be revealed. I have interviewed this person, found this person to be a prudent person, and have, under a sworn verbal statement, gained the following information: This person has personal knowledge of and has purchased illicit whiskey from within the residence described, for a period of more than 2 years, and most recently within the past 2 weeks, has knowledge of a person who purchased illicit whiskey within the past two days from the house, has personal knowledge that the illicit whiskey is consumed by purchasers in the outbuilding known as and utilized as the "dance hall", and has seen Roosevelt Harris go to the other outbuilding, located about 50 yards from the residence, on numerous occasions, to obtain the whiskey for this person and other persons.

The district court sustained the warrant on a motion to suppress. Respondent was thereafter tried before a jury, convicted, and sentenced to imprisonment for a period of two years. In reversing the conviction, the court of appeals held the search warrant to be insufficient on the grounds that the affidavit failed to provide a substantial basis for crediting the informant's statements; that the characterization of the informant as a "prudent person" signified only that he was circumspect in the conduct of his affairs; and that

the other allegations were insufficient to corroborate the information thus received.

REASONS FOR GRANTING THE WRIT

In *Spinelli v. United States*, 393 U.S. 410, and *Aguilar v. Texas*, 378 U.S. 108, this Court has held that an affidavit reciting information from an informant may be sufficient to provide the basis for issuing a search or arrest warrant, if the affidavit (1) sets forth the underlying circumstances with sufficient specificity to enable the magistrate to make an independent judgment concerning the validity of the informant's conclusion concerning the crime and (2) presents information to show that the informant is credible.

Here the only issue is whether the affidavit in question sufficiently established the credibility of the informant. In the past the Court has recognized that an informant's credibility may be established by showing (1) that he has previously given information that proved reliable (see *McCray v. Illinois*, 386 U.S. 300) or (2) that the information given by the informant was corroborated by the investigation of the law enforcement officers involved (see *Draper v. United States*, 358 U.S. 307). We ask the Court to grant review in this case because it presents the important question whether these are the exclusive means for establishing the credibility of an informant or whether there are other rational criteria which a magistrate may consider in determining whether what the informant said should be credited.

We believe there are circumstances in which a magistrate should be allowed to issue a warrant on

the basis of information supplied by a person who has never before provided information to the police. Indeed, the person who supplies information to the police on only one occasion will often be a more reliable type of individual than one who supplies such information on a regular basis. The latter is likely to be someone who is himself involved in criminal activity or is, at least, someone who enjoys the confidence of criminals. Cf. *Jaben v. United States*, 381 U.S. 214, 224. On the other hand, a hardworking, law-abiding citizen will rarely provide the police with information concerning a crime on more than one occasion. It seems unreasonable to say that a magistrate can rely entirely on information from the former but can rely on information from the latter only if it is corroborated by independent investigation.

This case presents, we submit, a clear example of the type of situation in which there is a sufficient basis for crediting the informant's assertions to permit the magistrate to rely on the informant's statements even though he has not previously provided information.

The affidavit reveals that for two years the informant had personally purchased illegal whiskey from the residence described and had made such a purchase within the preceding two weeks. The informant also knew a person who had made such a purchase within the preceding two days. Unquestionably, if that information were submitted to the Commissioner in an affidavit signed by the informant, it would have constituted probable cause for a warrant. The officer supplying the affidavit explained why the informer's affidavit could not be submitted—because the informer

feared for his life. The affidavit further explained why the officer credited the informer—because the informer had given the information under oath and seemed to the officer to be a “prudent” person.

In finding that the affidavit did not sufficiently establish a basis for crediting the informant, the court below regarded the affiant’s statement that the informer was a “prudent” person as being of no weight, and completely ignored the fact that the informant had sworn to the truth of his statement.

We submit that the police officer’s evaluation of the person supplying the information is a factor which the magistrate should be allowed to consider along with other information in the case. The police cannot entirely disregard information which comes to them from someone who has not given information in the past. When a person comes to them with information for the first time, they must make a judgment as to whether the man is the type of person who seems reliable. When the police determine that the informant is a prudent person, and he swears to the truth of his information, a reasonable magistrate should be able to issue a warrant on the basis of that information. Here the informant’s facts were so specific that, if the informant were to testify at trial, his testimony alone would be sufficient to convict. It seems illogical to say that a magistrate, in issuing a warrant, may not rely on the same information, also given under oath, simply because the affidavit of the investigator was submitted in order to protect the informant who feared for his life should his identity be revealed.

Moreover, the magistrate was not asked to rely upon the informant alone. The affidavit also set forth the background information concerning respondent's reputation over a period of years as a dealer in illicit whiskey and the discovery of the "stash" of whiskey on respondent's property. This information was relevant as furnishing a basis for crediting the specific and timely information received under oath from the informant. The court of appeals has, we submit, misinterpreted and unduly extended the statement in *Spinelli* (393 U.S. at 414) that the fact that Spinelli was known to officers as a gambler was "but a bald and unilluminating assertion of suspicion that is entitled to no weight in appraising the magistrate's decision." That is not the situation here. The affiant stated, not only that respondent was known to him for over four years as being a trafficker in illicit liquor, but added "over this period I have received numerous information from all types of persons as to his activities." This is a definite, substantial statement that information had come to the investigator over a period of years from a variety of sources that respondent had been violating the law. Such information is entitled to weight in a determination whether probable cause exists. *Brinegar v. United States*, 338 U.S. 160, 171-174; *Jones v. United States*, 362 U.S. 257, 271; *Rugen-dorf v. United States*, 376 U.S. 528. In addition, the fact that illegal liquor had actually been found on the premises during that period, while not itself sufficient to constitute probable cause, showed that respondent's reputation was not based on mere gossip, but was sup-

ported by public facts. A police officer, and a magistrate, aware of that background, could reasonably find in it further reason to credit the specific information supplied under oath by the informant.

While the particular offense here involved is not of great significance, the principle at stake is. A lead in solving a very serious crime may come from a person who has not previously given information. Law enforcement officers ought to be able to act on such information, even though the informer is unwilling to reveal his identity, when his information is specific, when he is willing to swear to the truth of his statements, when the officer is willing to swear that he found the informer credible, and when the information is consonant with other facts known to the law enforcement officers concerning the subject's reputation and activities.

CONCLUSIONS

It is respectfully submitted that the petition for writ of certiorari should be granted.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys.

JULY 1969.

APPENDIX A

United States Court of Appeals for the Sixth Circuit

No. 18961

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE
v.

ROOSEVELT HUDSON HARRIS, DEFENDANT-APPELLANT

[Filed May 28, 1969, Carl W. Reuss, Clerk]

Decided May 28, 1969

*On Appeal from the U.S. District Court for the
Eastern District of Kentucky at London*

Before WEICK, Chief Judge, O'SULLIVAN and MCCREE,
Circuit Judges.

PER CURIAM: Appellant was convicted of possessing non-tax-paid distilled spirits in violation of Section 5205a(2) of the Internal Revenue Code of 1954 and sentenced to two years in prison. The sole question on appeal is the sufficiency of an affidavit used to obtain a search warrant, the execution of which resulted in the discovery of approximately six gallons of whiskey on and about appellant's premises. The District Judge denied a motion to suppress this evidence, rejecting appellant's contention that the affidavit failed to establish probable cause.

The affidavit contained the following recitals: 1) during the past four years, the appellant had a reputation with the affiant of being a trafficker in non-tax-paid whiskey; 2) some time during this four year

period a constable had located a cache of whiskey in an abandoned house which was under appellant's control; and 3) an informer who the affiant "found * * * to be a prudent person" had told the affiant, as of the date of the affidavit, that he (the informer) "has personal knowledge of and has purchased illicit whiskey from within the residence [of appellant] for a period of more than 2 years, and most recently within the past 2 weeks," and that he knew of another person who purchased illicit whiskey at appellant's residence within the past 2 days.

The Supreme Court has held that an affidavit based on hearsay information may establish the probable cause requisite to the issuance of a search warrant if the issuing magistrate is:

informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant * * * was 'credible' or his information 'reliable.' *Aguilar v. Texas*, 378 U.S. 108, 114 (1964). *Accord, Spinelli v. United States*, 37 U.S.L.W. 4110 (U.S., Jan. 27, 1969).

This court recently applied the test enunciated in *Aguilar*, and decided that "a declaration in the affidavit that the informant visually observed the fact asserted therein would suffice to establish the probability of its existence, provided there was also a substantial basis for confirming the credibility of the informant." *United States v. Kidd*, No. 18465 (6th Cir., Feb. 25, 1969). In *Kidd*, the previous reliability of the informant served to confirm his credibility.

A declaration that the informer has purchased whiskey directly from the suspect at his residence is tantamount to an assertion of visual observation by

the informer. There is, however, nothing in the affidavit used in this case which would provide a "substantial basis for confirming the credibility of the [unidentified] informant." No information is provided which would enable the magistrate to assess his reliability or trustworthiness. The allegation that he is a "prudent person" signifies that he is circumspect in the conduct of his affairs, but reveals nothing about his credibility. Thus, the information received from the informer was not sufficient to establish probable cause for the issuance of the search warrant.

Of course, in *Spinelli, supra*, the Supreme Court held that, "If the tip is found inadequate under *Aguilar*, the other allegations which corroborate the information contained in the hearsay report should then be considered." 37 U.S.L.W. at 4112. We have done this, and we find the other declarations in the affidavit concerning appellant's reputation and the previous experience of a constable insufficient independent corroboration to overcome the inadequacies related to the informer's credibility. The assertion that appellant had a reputation with the affiant of being a trafficker in illegal whiskey would not, standing alone, establish probable cause. And the Supreme Court has held that this type of statement may not be used "to give additional weight to allegations that would otherwise be insufficient." *Spinelli v. United States*, 37 U.S.L.W. at 4113. The statement concerning the constable's discovery of a cache of whiskey gives no indication when, during the previous four years, this episode occurred. Reliance on this assertion would violate the principle that "probable cause must be determined as of the time the warrant is issued." *Schoeneman v. United States*, 317 F.2d 173, 177 (D.C. Cir. 1963).

Since the affidavit was insufficient to establish probable cause, issuance of the warrant was improper and the evidence obtained should have been suppressed. The judgment of the District Court is therefore reversed and the case is remanded for further proceedings consistent with this opinion.

Reversed.

APPENDIX B

United States Court of Appeals for the Sixth Circuit

[Filed May 28, 1969, Carl W. Reuss, Clerk]

No. 18961

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

ROOSEVELT HUDSON HARRIS, DEFENDANT-APPELLANT

Before: WEICK, Chief Judge, O'SULLIVAN and MCCREE,
Circuit Judges.

Judgment

APPEAL from the United States District Court for the Eastern District of Kentucky.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Kentucky and was submitted on briefs without oral argument.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed.

No costs awarded. Rule 39(b).
Entered by order of the Court.

CARL W. REUSS,
Clerk.

Issued as Mandate: A True Copy.

June 18, 1969

Attest:

Costs: NONE

CARL L. REUSS,

Filing fee----- \$-----

Clerk.

Printing ----- \$-----

Total ----- \$-----

APPENDIX C

Eastern District of Kentucky, Affidavit for Search
Warrant

Form A. O. 106

United States District Court for the Eastern District
of Kentucky

June 20, 1967, Davis T. McGarvey, clerk, U.S. district
court

Commissioner's Docket No. 5

Case No. 180

UNITED STATES OF AMERICA

vs.

ROOSEVELT HARRIS

AFFIDAVIT FOR SEARCH WARRANT

Before: KELLY CLORE, Commissioner, Pineville, Ken-
tucky.

The undersigned being duly sworn deposes and
says:

That he (has reason to believe)¹ that (on the prem-
ises known as) The Roosevelt Harris residence, a 5
or 6 room green sided frame dwelling, and including

¹ The Federal Rules of Criminal Procedure provide: "The
warrant shall direct that it be served in the daytime, but if the
affidavits are positive that the property is on the person or in
the place to be searched, the warrant may direct that it be
served at any time." (Rule 41C)

a red sided outbuilding located about 10 yards from the residence and known as the "Dance Hall", and another outbuilding, and a number of vehicles, the buildings containing basements and attics, and all other appurtenances, these buildings being located at 310 Dansbury Avenue, the 2nd dwelling on the left of Dansbury when approached from North 15th Street, in the City of Middlesboro, Bell County, Eastern District of Kentucky, there is now being concealed certain property, namely Non taxpaid distilled spirits in containers not bearing internal revenue stamps as required by law, which are fit and intended for use in violation of title 26, USC as amended, section 5604 (a)(1).

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: Roosevelt Harris has had a reputation with me for over 4 years as being a trafficker of nontaxpaid distilled spirits, and over this period I have received numerous information from all types of persons as to his activities. Constable Howard Johnson located a sizeable stash of illicit whiskey in an abandoned house under Harris' control during this period of time. This date, I have received information from a person who fears for their life and property should their name be revealed. I have interviewed this person, found this person to be a prudent person, and have, under a sworn verbal statement, gained the following information: This person has personal knowledge of and has purchased illicit whiskey from within the residence described, for a period of more than 2 years, and most recently within the past 2 weeks, has knowledge of a person who purchased illicit whiskey within the past two days from the house, has personal knowledge that the illicit whiskey is consumed by purchasers in the outbuilding known as and utilized

as the "dance hall", and has seen Roosevelt Harris go to the other outbuilding, located about 50 yards from the residence, on numerous occasions, to obtain the whiskey for this person and other persons.

RUSSELL R. BAUER,
Special Investigator, A&TTD.

Sworn to before me, and subscribed in my presence, 17th of June, 1967.

KELLY CLORE,
United States Commissioner.